



REPUBLIC OF KENYA



Wainaina & others v Rose Muthoni t/a Manjig Enterprises & 5 others (Environment & Land Case 404 of 2014) [2024] KEELC 143 (KLR) (24 January 2024) (Ruling)

Neutral citation: [2024] KEELC 143 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 404 OF 2014
AA OMOLLO, J
JANUARY 24, 2024**

BETWEEN

AMOS KABURU WAINAINA & OTHERS APPLICANT

AND

ROSE MUTHONI T/A MANJIG ENTERPRISES 1ST DEFENDANT

JULIA WAMBUI GICHIA 2ND DEFENDANT

VIPRO LIMITED 3RD DEFENDANT

COMMISSIONER OF LANDS 4TH DEFENDANT

REGISTRAR OF TITLES 5TH DEFENDANT

CONSOLIDATED BANK OF KENYA 6TH DEFENDANT

RULING

1. For determination is the application dated June 20, 2023 filed by the 1st Defendant hereinafter referred to as the Applicant. The application is brought under the Provision of the [Civil Procedure Rules](#) (Order 1 rule 10, Order 2 rule 15 and Order 51) and overriding section of the [Civil Procedure Act](#). The 1st Defendant/Applicant is seeking orders that:
 - i. The 1st Defendant's name be struck out from this suit.
 - ii. The cost of the application be in the cause.
 - iii. Any other relief the court deems just to grant.
2. The application is based on the following grounds'
 - a. That the plaintiff has been erroneously sued in this matter.



- b. That there is no cause of action sustainable against the 1st Defendant.
 - c. That the 1st Defendant already disposed of the suit property herein way before the filing of this matter.
 - d. That the 1st Defendant has no interest in the said property.
 - e. That it will be important if the 1st Defendants name is struck off these proceedings.
 - f. That unless the orders sought are granted the defendant/applicant shall be prejudiced.
3. The affidavit sworn in support of the application reiterated the grounds stated on the face of the application.
 4. The plaintiff did not file any pleading in opposition to the application. The 2nd defendant filed a replying affidavit sworn on June 23, 2023 in opposition thereto. Ms. Julia Wambui Gichia deposed that the 1st defendant is properly sued as she is the one who fraudulently transferred the suit property LR 209/2788/15 Mwimbi Road from Lakamshi Popat to her name. Ms. Wambui stated that the 1st Defendant transferred the 2nd Defendants property without consulting them and now she is alleging being wrongly sued.
 5. They contended that the 1st Defendant used orders wrongly obtained in Milimani CMCC 3903 of 2012 where they were not parties to evict the 2nd Defendant's lawful tenants from the suit premises and the 2nd Defendant/Respondent annexed copies of the order to support this averment. Consequently, the 2nd Respondent assert that the adjudication of this case will have a direct implication on the 1st defendant thus making her a necessary party.
 6. The 1st Defendant/Applicant filed written submissions dated August 17, 2023. She submitted that having legally and properly disposed of the suit property to another party, she no longer has any interest on the property and no claim can be sustained against her in these proceedings. She supported this argument by making reference to the ruling of S. Okong'o J. rendered on September 15, 2017 where the judge started thus;

“Secondly, in the application before me, orders of injunction are sought only as against the defendant and the 2nd interested party. From the material placed before the court by the proposed 1st Interested party, the defendant transferred her interest in the suit property to the 2nd Interested party on July 18, 2012. Since the defendant no longer has any interest in the suit property, the orders of injunction sought against her in the present application are unnecessary and cannot be issued since the court never acts in vain.”

7. The Applicant further relied on the decision of *Joseph Njau Kingori vs Robert Maina Chege & 3 Others* (2002) eKLR which enumerated the 4 aspects to look at before joining a party to a suit to wit;
 - i. Is a necessary party
 - ii. A property party
 - iii. Where is a relief flowing from him to the plaintiff
 - iv. The ultimate order/decreed cannot be enforced without his participation in the proceedings.
8. When the matter came upon October 4, 2023, Mr. Evans Ondieki learned Counsel for the 2nd Defendant informed this court that they had filed their written submissions. However, I have found



none on the court's online platform or a physical copy in the court file. Still I shall proceed to determine the application on its merits since it was opposed.

9. I have perused the pleadings filed and note that the claim was brought by the plaintiff as against the 1st defendant as the only defendant before the addition of more defendants. At paragraph 6 of the plaint dated August 23, 2012, it is pleaded against the 1st defendant thus;

“The Plaintiffs’ further contend that on the 27th day of July, 2011, in utter shock and disbelief, on the 27th day of August, 2012, the Defendant through her agents, employees and/or a cabal of armed officers of about 100 in number broke into the suit premises purportedly in exercise of a court eviction order, vandalised and strew the plaintiff’s good and chattels all over destroying them much to their chagrin and detriment. The plaintiff shall prove the same at the hearing hereof.”

10. There are direct reliefs sought against the 1st Defendant by the plaintiff. Further the 2nd defendant has filed a defence and a Counter –claim against the 1st defendant and the plaintiffs. They have listed several particulars of fraud and misrepresentation committed by the 1st defendant. The 2nd defendant also sought to be declared as the legal owner of the suit title LR No. 209/2788/15 Mwimbi Road, Nyamakima and for compensation and loss.
11. The pleadings thus demonstrate that the 1st defendant is a necessary party to these proceedings since she once owned the suit title before disposing it. To demonstrate why she is a necessary party, one of the issues that will arise at the trial is whether or not she had acquired the suit title legally which then would give her capacity to dispose it to a 3rd party. There is also a claim for compensation sought arising from what the 2nd Defendant calls illegal demolitions initiated by the 1st Defendant/Applicant.
12. In the case of *D.T Dobie Co. Kenya Ltd. vs. Joseph Mbaria Muchina & Another* (1982) KLR 1, the Court of Appeal stated thus;

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits “without discovery, without oral evidence tested by cross-examination in the ordinary way.” (Seller LJ (*supra*). As far as possible indeed, there should be no opinion expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.

13. The fact that S. Okong’o J. did not grant orders of temporary injunction against her does not preclude her from being a necessary party in the main suit. The finding was limited to the fact of not having any interest in the suit property to interfere with it and that would require the court to stop such interference at the interlocutory stage. However, the order did not change the fact that her ownership of the suit property is being questioned and damages sought in respect to actions it is alleged she participated in.
14. Consequently, I am persuaded to find the 1st defendant is a necessary party to these proceedings as it is her actions which generated the cause of action in this suit. The result is that her application seeking to have her name removed is found to lack merit. It is dismissed with costs to the 2nd defendant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY, 2024



A. OMOLLO
JUDGE

